INDEX

TABLE OF CASES

STATUTES

MISC.

Supreme Court of the United States

October Term, 1966

No. 69

ROBERT A. BELL, JR.,

Petitioner,

vs.

THE STATE OF TEXAS,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

BRIEF OF THE ATTORNEY GENERAL OF NORTH CAROLINA AMICUS CURIAE

INTEREST OF THE STATE OF NORTH CAROLINA

The State of North Carolina, through its Attorney General, files this brief as amicus curiae pursuant to the provisions of Rule 42, Paragraphs 4 and 5, of the Revised Rules of the Supreme Court of the United States.

The primary issue in the principal case before the Court is whether or not Petitioner was denied due process of law and equal protection of the law under the Fourteenth Amendment of the Constitution of the United States as the result of the reading to the jury a bill of indictment containing charges as to the offense for which Petitioner was then on trial and also allegations, or charges, of a prior offense committed by Petitioner for which Petitioner was convicted for purposes of enhancing Petitioner's punishment. The State of North Carolina is highly interested in any decision

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that may result from the presentation of this issue since the State of North Carolina has several statutes which increase the punishment upon prosecution for a second or subsequent offense if the prisoner is convicted of such second or subsequent offense.

Under North Carolina procedure and by statute the prior offense is alleged in the bill of indictment for the subsequent offense, such allegations as to the prior offense being governed by a procedural statute, and all issues as to the subsequent offense and prior offense are tried together and the jury is required to find the existence of a prior offense, if any, the prior record and identity of the prisoner.

Should the position of the Petitioner prevail in this case, then the procedural statute and decisious of the Supreme Court of North Carolina on this subject would be nullified.

OPINION BELOW

The Opinion of the Court of Criminal Appeals of Texas is reported at 387 S. W. 2d 411.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 USC 1257(3).

QUESTION PRESENTED

Is it a violation of the Due Process and Equal Protection Clause of the Fourteenth Amendement to read or make known to the jury the Petitioner's prior conviction and to introduce evidence as to Petitioner's prior conviction upon the trial of a subsequent offense for the purpose of increasing or enhancing punishment?

STATEMENT OF THE CASE

We do not state facts in regard to the case as there seems

to be no dispute as to the statement of facts made by the Petitioner in his brief.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

As to the State of North Carolina, there are involved certain statutes, as follows:

"Sec. 15-147. *Former conviction alleged in bill for second offense.*—In any indictment for an offense which, on the second conviction thereof, is punished with other or greater punishment than on the first conviction, it is sufficient to state that the offender was, at a certain time and place, convicted thereof, without otherwise describing the previous offense; and a transcript of the record of the first conviction, duly certified, shall upon proof of the identity of the person of the offender, be sufficient evidence of the first conviction."

We also give below certain examples of statutes of the State of North Carolina wherein the punishment is increased for a second or subsequent offense. All section references are to the General Statutes of North Carolina, together with Cumulative Supplements:

"Sec. 18-28. *Distilling or manufacturing liquor; first offense misdemeanor.*—It is unlawful for any person to distill, manufacture, or in any manner make, or for any person to aid, or abet any such person in distilling, manufacturing, or in any manner making any spirituous or malt liquors or intoxicating bitters within the State of North Carolina. Any person or persons violating the provisions of this section shall, for the first conviction, be guilty of a misdemeanor and, upon conviction or confession of guilt, punished in the discretion of the court; for the second or any subsequent conviction, said person or persons shall be guilty of a felony, and upon conviction or confession in open court shall be imprisoned in the State Prison for not less than four months and not exceeding five years, in the discretion of the court."

Another example is the Penalty Statute for a violation of the Narcotic Drug Act of North Carolina, and a portion of this Penalty Statute is as follows:

"Sec. 90-111. *Penalties for violation.* — (a) Any person violating any provision of this article or any person who conspires, aids, abets, or procures others to do such acts shall upon conviction be punished, for the first offense, by a fine of not more than one thousand dollars ($1,000.00) or be imprisoned in the penitentiary for not more than five years, or both, in the discretion of the court. For a second violation of this article, or where in case of a first conviction of violation of this article, the defendent shall previously have been convicted of a violation of any law of the United States, or of this or any other State, territory, or district, relating to the sale or use or possession of narcotic drugs or Marijauna, and such violation would have been punishable in this State if the offending act had been committed in this State, the defendant shall be fined not more than two thousand dollars ($2,000.00) and be imprisoned not less than five nor more than ten years. For a third or subsequent violation of this article, or where the defendant shall previously have been convicted two or more times in the aggregate of a violation of any law of the United States, or of this or any other State, territory, or district relating to the sale, use or possession of narcotic drugs or Marijauna, and such violation would have been punishable in this State, the defendant shall be fined not more than three thousand dollars ($3,000.00) and be imprisoned in the penitentiary not less than fifteen (15) years nor more than life imprisonment."

The remaining subsections of this section relate to suspended sentences and probation and also for an increased offense for selling or furnishing such drugs to a minor.

We do not quote the provisions of the Fourteenth Amendment or of the Sixth Amendment as they are set forth in Petitioner's brief.

It is customary in North Carolina for the prosecuting officer to notify the prisoner as to the charges against him by reading the bill of indictment and demanding that the prisoner plead to the indictment.

SUMMARY OF ARGUMENT

The State of North Carolina will argue that the procedure as to pleading or proving a second or subsequent offense

does not violate the constitutional rights of a person on trial for such second or subsequent offense.

The State of North Carolina will further argue that such procedure does not result in an unfair or prejudicial trial.

ARGUMENT

IT IS CONSTITUTIONAL FOR THE STATE TO ALLEGE IN THE BILL OF INDICTMENT FOR A SECOND OR SUBSEQUENT OFFENSE THE FACT OF A PRIOR OFFENSE AND CONVICTION, AND TO INTRODUCE EVIDENCE AS TO SUCH PRIOR CONVICTION UPON TRIAL OF THE SECOND OR SUBSEQUENT OFFENSE.

So far as the State of North Carolina is concerned we have heretofore quoted the procedural statute which requires the allegations as to the prior conviction to be set forth in the bill of indictment for the subsequent offense. Our decisions show that both issues are tried in the trial for the second or subsequent offense. The Case of STATE v. POWELL, 254 N. C. 231, 118 S. E. 2d 617, is an example of this practice. In the Powell Case the Supreme Court of North Carolina said:

> "Where a person is charged in a bill of indictment or warrant with an offense which, on the second conviction thereof, is punishable with a greater penalty than on the first conviction, and the indictment or warrant alleges a prior conviction, 'a transcript of the record of the first conviction, duly verified, shall, upon proof of the identity of the person of the offender, be sufficient evidence of the first conviction.' G. S. 15-147. STATE v. STONE, 245 N. C. 42, 44, 95 S. E. 2d 77. The verdict of the jury 'should spell out, first, whether the jury find the defendant guilty of the violation of G. S. 14-138 charged in the warrant or indictment, and if so, whether they further find that he was convicted of' the alleged prior violation thereof. STATE v. STONE, supra. While it is

not required, it would not be amiss to submit to the jury written issues. * * *"

In the Case of STATE v. LAWRENCE, 264 N. C. 220, 141 S. E. 2d 264, commenting on this practice the Supreme Court of North Carolina said:

> "The accused may be convicted of the specific offense charged, or he may be convicted as in case of a second offense. The verdict must spell out (1) whether defendant is guilty of the specific violation charged and, if so, (2) whether he was convicted of a prior violation of such offense charged. STATE v. POWELL, supra; STATE v. COLE, 241 N. C. 576, 86 S. E. 2d 203. In other words, the accused may, on a charge such as that preferred against petitioner, be convicted or plead guilty to the specific violation charged—a misdemeanor—or he may be convicted or plead guilty as in case of a second offense—a felony. Punishment is in accordance with the conviction or plea. * * *"

For the North Carolina rule, see also: STATE v. MILLER, 237 N. C. 427, 75 S. E. 2d 242; STATE v. STONE, 245 N. C. 42, 95 S. E. 2d 77; STATE v. DAVIDSON, 124 N. C. 839, 32 S. E. 957; STATE v. COLE, 241 N. C. 576, 86 S. E. 2d 203.

This Court has approved and has generally upheld the validity of habitual criminal acts and other forms of criminal recidivist legislation, and, as we understand the matter, no constitutional attack is made upon such acts as being generally invalid, and indeed no such attack could be made for this Court had declared such acts to be constitutional (MOORE v. MISSOURI, 159 U. S. 673, 40 L. ed. 301, 16 S. Ct. 179; McDONALD v. MASSACHUSETTS, 180 U. S. 311, 45 L. ed. 542, 21 S. Ct. 389; GRAHAM v. WEST VIRGINIA, 224 U. S. 616, 56 L. ed. 917, 32 S. Ct. 583; OYLER v. BOLES, WARDEN, 368 U. S. 448, 7 L. ed. 2d 446, 82 S. Ct. 501).

We feel that this Court has also expressed its opinion upon the method or procedure as to how the prior offense may be

proved or established; that is, whether it should be done in an independent proceeding or in the same proceeding in which the subsequent offense is tried. For example: In CHANDLER v. WARDEN FRETAG, 348 U. S. 3, 99 L. ed. 4, 75 S. Ct. 1, in commenting upon this particular issue Mr. Chief Justice Warren, writing for the Court, said:

> "In short, even though the act does not create a separate offense, its applicability to any defendant charged with being an habitual criminal must be determined by a jury in a judicial hearing. Compare WILLIAMS v. NEW YORK, 337 U. S. 441. That hearing and the trial on the felony charge, *although they may be conducted in a single proceeding,* are essentially independent of each other." (Emphasis ours)

In the Case of OYLER v. BOLES, supra, this Court said:

> "Even though an habitual criminal charge does not state a separate offense, the determination of whether one is an habitaual criminal is 'essentially independent' of the determination of guilt on the underlying substantive offense. CHANDLER v. FRETAG, 348 U. S. 3, 8, (1954). Thus, although the habitual criminal issue may be combined with the trial of the felony charge, 'it is a distinct issue, and it may be appropriately the subject of separate determination.' "

In GRAHAM v. WEST VIRGINIA, supra, this Court said:

> "It cannot be said that the prisoner was deprived of due process of law because the question as to former conviction was passed upon separately. While it is familiar practice to set forth in the indictment the fact of prior conviction of another offense, and to submit to the jury the evidence upon that isue, together with that relating to the commission of the crime which the indictment charges, still in its nature it is a distinct issue, and may appropriately be the subject of separate determination."

A canvass of the highest appellate courts of the States will

show that more than one-half follow the rule of determining the issue as to the prior offense at the same time as the trial of the subsequent offense, and while the issue as to the prior offense is said to be an independent or separate issue, nevertheless, over the years no constitutional fault has been found with this procedure. The fact that some states are beginning to revise their codes and provide for the issue of the prior offense to be heard after a conviction on trial of the subsequent offense this does not mean that the previous procedure was unconstitutional; it only means that there has been a change in some states as to their legislative concepts on the subject. While a mere mathematical enumeration does not prove or disprove the issue of constitutionality, yet it is hard to believe that over the decades a majority of the courts have been wrong about the matter, and we are just now at this late date discovering the error. This is especially true since this Court has approved the trial of both issues in one proceeding as an acceptable method.

The only exception, so far as the Federal Courts are concerned, appears to be the Case of LANE v. WARDEN, MARYLAND PENITENTIARY, 320 F. 2d 179 (4th Cir. 1963). A reading of the opinion in LANE v. WARDEN, supra, shows that the Court greatly relied upon the fundamental rule that evidence of prior crimes is inadmissible at a criminal trial either to establish guilt or to show that a defendant would be likely to commit the crime with which he is charged. Of course, as everyone knows, this rule is much more honored by the exceptions which are many. The Court ignores the proposition that other independent offenses have long been admitted or shown in evidence to show knowledge, intent and motive; to show plan or design, to prove identity, or, in cases where two offenses are so closely connected, that neither can be adequately proved without proving the other. One of the oldest forms of this exception is the well-known case where an attempt is made to bribe a juror and which independent crime can be shown by way of admission of guilt.

The Case of MICHELSON v. UNITED STATES, 335 U. S.

469, 93 L. ed. 168, 69 S. Ct. 218, certainly does not support the rule contended for in Lane. If it is said that reading the bill of indictment to the jury which contains an allegation of a prior offense is highly prejudical to the defendant, then by the same token the reading of the bill of indictment as to the primary or subsequent offense is prejudical to the defendant as well as reading many bills of indictment where the defendant is indicted for multiple offenses or a bill of indictment which contains many separate counts. This can be no more prejudicial than the position of the defendant who feels impelled to become a witness in his own behalf and is forced to admit previous crimes.

The Petitioner apparently thinks that because an unfair trial has been shown under the circumstances set forth in *Michelson* it follows as a conclusive presumption that an unfair trial was had in his case. He disregards the fact that the legislatures of the States in enacting habitual criminal laws or laws giving increased punishment for subsequent offenses have made his criminal record a part of his case although decided as an independent issue. Here we should bear in mind what Mr. Justice Cardozo said (PALKO v. CONNECTUCUT, 302 U. S. 319, 82 L. ed. 288, 58 S. Ct. 149):

> "The tyranny of labels (SNYDER v. MASSACHUSETTS, 291 U. S. 97, 114, 78 L. ed. 674, 682, 54 S. Ct. 330, 90 ALR 575) must not lead us to leap to a conclusion that a word which in one set of facts may stand for an oppression or enormity is of like effect in every other."

And in SNYDER, supra, this same Justice said:

> "A fertile source of perversion in constitutional theory is the tyranny of labels. Out of the vague precepts a court frames a rule which is general in form, though it has been wrought under the pressure of particular situations. Forthwith another situation is placed under the rule because it is fitted to the words, though related faintly, if at all, to the reasons that brought the rules to existence."

We think the concept expressed by Mr. Justice Jackson in the Case of ASHCRAFT v. TENNESSEE, 322 U. S. 143, 88 L. ed. 1192, 64 S. Ct. 921, is still today a sound concept. He said:

> "The burden of protecting society from most crimes against persons and property falls upon the state. Different states have different crime problems and some freedom to vary procedures according to their own ideas. * * * The use of the due process clause to disable the states in protection of society from crime is quite as dangerous and delicate a use of federal judicial power as to use it to disable them from social or economic experimentation. The warning words of Mr. Justice Holmes in his dissenting opinion in BALDWIN v. MISSOURI, 281 U. S. 586, 595, 74 L. ed. 1056, 1061, 50 S. Ct. 436, 72 ALR 1303, seem to us appropriate for rereading now."

In BOWMAN v. LEWIS, 101 U. S. 22, 25 L. ed. 989, Mr. Justice Bradley said:

> "The 14th Amendment does not profess to secure all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each State prescribes its own modes of judicial proceedings."

In MAXWELL v. DOW, 176 U. S. 581, 593, 44 L. ed. 597, this Court said:

> "* * * The people can be trusted to look out and care for themselves. There is no reason to doubt their willingness or their ability to do so, and when providing in their Constitution and legislation for the manner in which criminal and civil actions shall be tried, it is in entire conformity with the character of the federal government that they should have the right to decide for themselves what shall be the form and character of the procedure in such trials."

Again in SNYDER v. MASSACHUSETTS, supra, Mr. Justice Cardozo said:

> "The Constitution and statutes and judical decisions of the Commonwealth of Massachusetts are the authentic forms through which the sense of justice of the people of that Commonwealth expresses itself in law. *We are not to supersede them on the ground that they deny the essentials of a trial because opinions may differ as to their policy or fairness.* Not all the precepts of conduct precious to the hearts of many of us are immutable principles of justice, * * *." (Emphasis ours)

Again in SNYDER v. MASSACHUSETTS, supra, the words of Mr. Justice Cordoza are very appropriate when he said:

> "Due process of law requires that the proceeding shall be fair, but fairness is a relative, not an absolute concept. It is fairness with reference to particular conditions or particular results. 'The due process clause does not impose upon the states a duty to establish ideal systems for the administration of justice, with every modern improvement and with provision against every possible hardship that may befall.' * * * What is fair in one set of circumstances may be an act of tyranny in others."

The cases resulting in unfair trials because of prejudicial newspaper accounts or the televising of a state criminal trial (ESTES v. TEXAS, 381 U. S. 532, 14 L. ed. 2d 543, 85 S. Ct. 1628; SHEPHERD v. FLORIDA, 341 U. S. 50, 95 L. ed. 740, 71 S. Ct. 549) are not in point. In such cases the trial was infected with unfairness because of acts and operations that came in from the outside and in some instances neither the prisoner nor the State had any control over the situation. It is not enough to say that because a criminal's previous conviction is made a part of the subsequent offense as to punishment that the trial is automatically infected with unfairness. The rule expressed by this Court in BUCHALTER v. NEW YORK, 319 U. S. 427, 87 L. ed. 1492, 63 S. Ct. 1129, is applic-

able, and the rule expressed by this Court is as follows:

> "As we have recently said, 'It is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality.'"

We believe, therefore, that the decisions of the Fifth Circuit and the Eighth Circuit are much more apposite to this situation. The language of the Court in BREEN v. BETO, 341 F. 2d 96, (5th Cir. 1965) is much more in accord with the previous concepts of this Court as to the proper functions of the Fourteenth Amendment, when it said:

> "In support of his contention, appellant cites and strongly relies on LANE v. WARDEN, 320 F. 2d 179 (4th Cir. 1963). This Court has never so held, and under the controlling Texas statutes and the authorities we are not disposed to adopt or follow the cited opinion. On the contrary, we are of the firm view that the case was not well decided and that the correct view of the law is otherwise."

To the same effect, REED v. BETO, 343 F. 2d 723; TAYLOR v. BETO, 346 F. 2d 157; REYES v. BETO, 345 F. 2d 722; WENDELL O'DELL STEPHENS v. BETO, 377 S.W. 2d 139, cert. den. ____ U. S. ____, 85 S. Ct. 1344.

In WOLFE v. NASH, 313 F. 2d 393, the Eighth Circuit expressed itself in accord with the previous concepts of this Court when it said:

> "How and in what way proof of prior convictions shall be made under the State habitual criminal statute, and what effect a deviation from the requirements of the statute would have, we regard as purely a local legal problem and of no national concern whatever."

CONCLUSION

We ask that this brief be considered also in connection with SPENCER v. TEXAS, No 967, October Term, 1965, which is now pending before this Court and which raises the same questions as are now raised in the Bell Case (No. 69). North Carolina, therefore, asks that its procedure shall remain in force and not be disturbed. The criminals of the underworld are not stupid, and they quickly become aware of the facts that repeated acts of crime can bring more severe punishment. When a State legislature says that a prior conviction can bring about increase of punishment and a State supreme court holds that the issue as to the prior conviction can be tried at the same time as the trial of the subsequent offense, then why should the criminal be protected as to his criminal record? We suggest that the protection of law abiding citizens who go about their daily lives should weigh more heavily than the protection of the criminal.

Respectfully submitted,

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